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No. 86-1614

Supreme Court, U.S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

**DOROTHY A. GRAHAM, as The Executrix of The Estate of
JAMES M. GRAHAM, Deceased,
*Petitioner,***

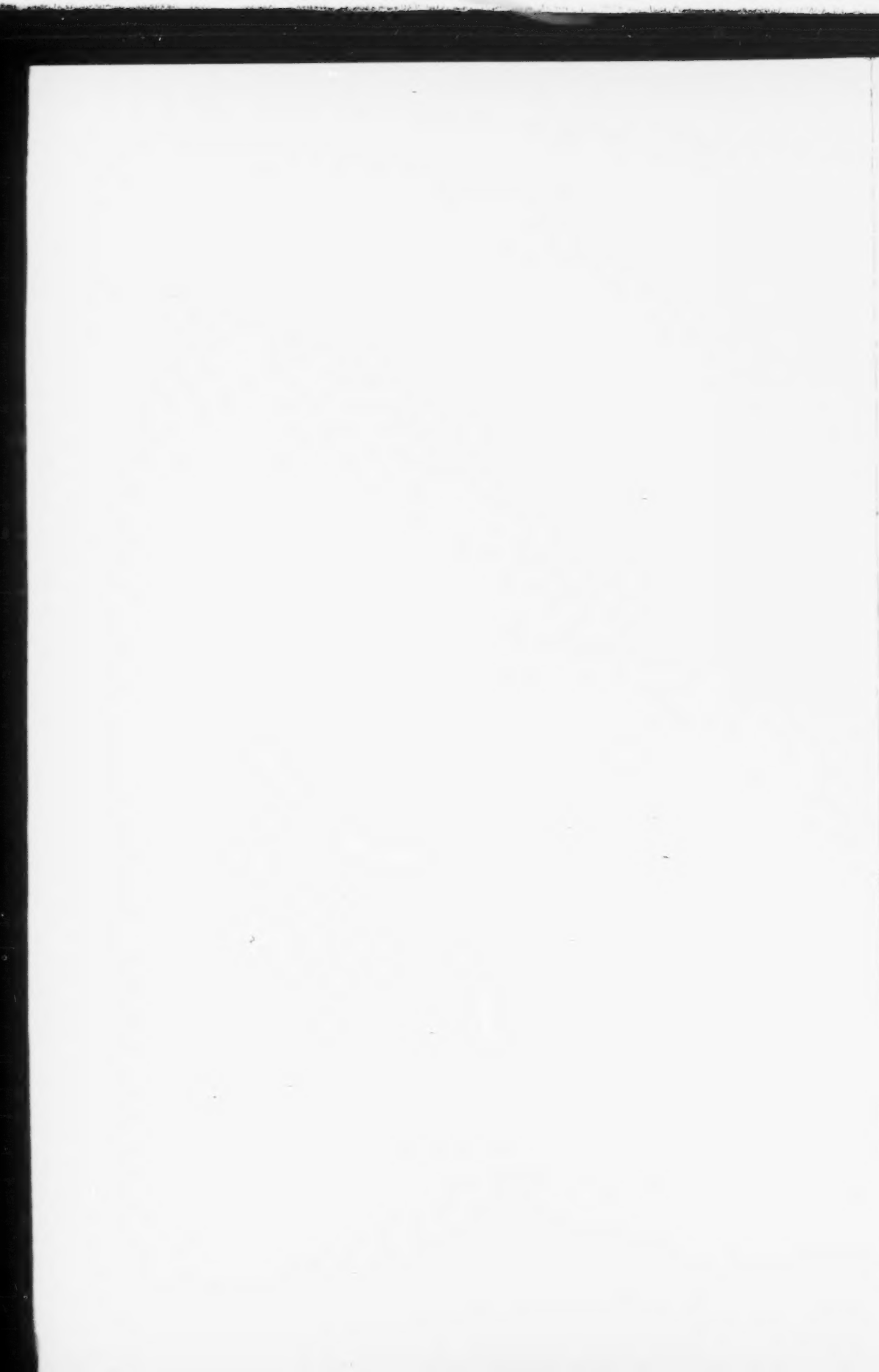
v.

**TELEDYNE-CONTINENTAL MOTORS, a Division of TELEDYNE
INDUSTRIES, INC., and THE NATIONAL TRANSPORTATION
SAFETY BOARD,
*Respondents.***

**Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

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QUESTIONS PRESENTED FOR REVIEW

1. May the National Transportation Safety Board ("NTSB"), exercise its discretion in investigating an aircraft crash so as to destroy physical evidence and thereby deprive a civil litigant of a constitutionally protected property right?

2. If the NTSB may exercise its discretion in investigating an aircraft crash so as to deprive a civil litigant of a constitutionally protected property right, are there available damage remedies adequate to compensate for such deprivation?

3. Are the NTSB regulations concerning participation by non-NTSB personnel in the destructive testing of an aircraft's wreckage void, as enacted contrary to the notice and comment rulemaking procedures established by the Administrative Procedures Act?

4. If the NTSB's regulations concerning participation by non-NTSB personnel in the destructive testing of an aircraft's wreckage are properly promulgated, do such regulations require that the NTSB conduct its investigation consistent with procedural fairness to the pilot or owner of the aircraft who is a party to civil litigation?

5. If the NTSB's regulations concerning participation by non-NTSB personnel in the destructive testing of an aircraft's wreckage are properly promulgated, do such regulations require that the NTSB permit the pilot or owner of the aircraft to participate in or at least observe the destructive testing of the aircraft's wreckage?

6. Does the Congressional legislation granting the NTSB its powers to investigate an aircraft crash require the NTSB to grant to the aircraft owner a right to participate in or at least observe destructive testing of the aircraft's wreckage?

7. Does the Congressional legislation granting the NTSB its powers to investigate an aircraft crash prohibit the NTSB's discrimination among civil litigants in permitting participation in or observation of the destructive testing of the aircraft's wreckage?

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DOROTHY A. GRAHAM, as The Executrix of The Estate of
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v.

TELEDYNE-CONTINENTAL MOTORS, a Division of TELEDYNE
INDUSTRIES, INC., and THE NATIONAL TRANSPORTATION
SAFETY BOARD,
Respondents.

**Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

*To: The Honorable Chief Justice and Associate Justices of the
Supreme Court of The United States*

Petitioner, Dorothy A. Graham, as Executrix of the Estate of James M. Graham, Deceased, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, decided and entered on December 10, 1986, and as amended on denial of rehearing and rehearing en banc on February 11, 1987.

REFERENCE TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, as amended on denial of rehearing and rehearing en banc, (Appendix, *infra*, pp.A-1 to A-9) is reported in 805 F.2d 1386 (9th Cir., 1986). The order of the United States District

Court for the Northern District of California (Appendix, *infra*, pp. A-10 to A-11) is unreported.

STATEMENT OF THE GROUND ON WHICH JURISDICTION IS INVOKED

(i) The judgment sought to be reviewed is the opinion, as amended on denial of rehearing and rehearing en banc, of the United States Court of Appeals for the Ninth Circuit in *Dorothy A. Graham, et al. v. Teledyne Continental Motors, et al.*, 805 F.2d 1386 (9th Cir. 1986).

(ii) A Petition for Rehearing was timely filed and denied on February 11, 1987.

(iii) The statutory provision conferring jurisdiction to review the judgment in question is 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution, statutes, and regulations involved are set forth in Appendix, *infra*, pp. A-12 to A-16. The provisions involved are: The Constitution of the United States, Fifth Amendment, Due Process; Independent Safety Board Act of 1974, 304(b)(2), 49 U.S.C. § 1903(b)(2); 49 C.F.R. §§ 805.735-3(c), 831.9(a), and 831.10(a).

STATEMENT OF THE CASE

1. Background

In the evening of December 23, 1985, a twin-engine Beechcraft Baron aircraft crashed into the Sun Valley Mall in Concord, California while executing the missed approach procedure for Runway 19R at Buchanan Field Airport. As a result of the crash, there were several deaths, a large number of persons injured and extensive property damage. Petitioner's decedent, James M. Graham, died in the crash. Several actions have been filed in California's state courts, naming as a defendant the Estate of Graham, and alleging that the Estate of Graham's decedent was the pilot and owner of the aircraft at the time of the crash.

Within days of the crash, the National Transportation Safety Board (hereinafter "NTSB") conducted a preliminary inspection of the aircraft's wreckage, in San Jose, California. The Estate of Graham retained James Jensen, an engineering consultant and air safety investigator, to represent the Estate of Graham in observing the inspection of the wreckage. Mr. Jensen was present during the preliminary inspection, and observed evidence indicating that the crash was caused by an engine failure in flight.

On about December 28, 1985, at the request of the NTSB, the aircraft's engines were shipped to Teledyne-Continental Motors' (hereinafter "Teledyne") manufacturing facility in Mobile, Alabama. Teledyne is the manufacturer of the accident aircraft's engines. The NTSB intended to have Teledyne conduct a destructive examination of the engines at this Teledyne facility.

On about December 27, 1985, counsel for the Estate of Graham sent telexes and Federal Express correspondence to the President of Teledyne-Continental Motors, and Teledyne Industries' corporate counsel. That correspondence requested that the Estate of Graham's technical representative be permitted to observe any teardown inspection or destructive testing which Teledyne intended to conduct under the supervision of the NTSB. That correspondence also requested that Teledyne refrain from any destructive testing or teardown inspection of the power plant wreckage, since the process might permanently destroy evidence crucial to the Estate of Graham's civil liabilities, if any, arising out of the crash.

On about December 30, 1985, having received no reply to its correspondence, counsel for the Estate of Graham sent a second telex to the President of Teledyne-Continental Motors and to the corporate headquarters of Teledyne Industries, Inc. That telex advised that unless a response was received by December 31, 1985, the Estate of Graham would have no recourse but to seek a temporary restraining order from the United States District Court, enjoining any examination or testing of the engines pending a judicial hearing on the Estate of Graham's request to observe.

On about December 30, 1985, counsel for the Estate of Graham sent Federal Express correspondence to the Director, Bureau of Field Operations, of the NTSB. Said correspondence requested, pursuant to 49 Code of Federal Regulations § 831.10(a), that the Estate of Graham be designated a "party" to the investigation, in order that it might participate in the inspection and/or testing of the wreckage to be performed by Teledyne. Said correspondence requested a response by January 2, 1986. Similar correspondence was sent to the Director, Bureau of Accident Investigation of the NTSB, and to the investigator-in-charge of the NTSB's field investigation.

On about December 31, 1985, counsel for the Estate of Graham was contacted by attorney Michael Kelly of the law offices of Kirtland & Packard in Los Angeles, California. Mr. Kelly advised that he was counsel for Teledyne in connection with any restraining order which might be sought. Mr. Kelly further advised that at the request of the NTSB, the aircraft's engines had been shipped to Teledyne's manufacturing facility in Mobile, Alabama, on December 28, 1985, for a teardown inspection by the NTSB and Teledyne.

On about January 7, 1986, counsel for the Estate of Graham received another telephone call from Mr. Kelly. Mr. Kelly advised that an assistant to the NTSB investigator-in-charge of the field investigation of the accident, had instructed Teledyne not to provide any further information of any kind to counsel or any representative of the Estate of Graham, concerning the place, time or manner of any further planned teardown or destructive testing of the accident aircraft's engines. Mr. Kelly also advised that the NTSB had been apprised of the Estate of Graham's request to observe the teardown and destructive testing, but had refused the request.

The same date of the aforementioned telephone conversation, counsel for the Estate of Graham sent correspondence by telecopier, Federal Express/Zap Mail, to the President of Teledyne-Continental Motors, the NTSB, and counsel for Teledyne, objecting to the secret destruction of physical evidence crucial to defending the rights of the Estate of Graham, and further advising of the Estate of Graham's intention to seek an

injunction prohibiting destructive testing until a representative of the Estate of Graham would be permitted to attend.

2. Proceedings in the United States District Court for the Northern District of California

On January 8, 1986, the Estate of Graham filed its Complaint for Injunctive Relief in the United States District Court for the Northern District of California. Upon presentation of Petitioner's application on January 8, 1986 for a restraining order against destructive testing by the NTSB and Teledyne, the District Court issued a verbal restraining order, effective until January 9, 1986 at 2:00 p.m., at which time the District Court would hold a hearing on the application.

The hearing on the Estate of Graham's Application for a Restraining Order was held on January 9, 1986, before the Honorable Marilyn Hall Patel, United States District Judge for the Northern District of California. The NTSB was represented by the Department of Justice, Office of the U.S. Attorney. Teledyne was represented by the law office of Kirtland & Packard. Although not a party to the proceeding, the airframe manufacturer, Beechcraft Corporation, made a voluntary appearance. Neither the NTSB nor Teledyne filed any papers, nor presented any evidence, in opposition to the Estate of Graham's Application for a Restraining Order. The District Court heard the Estate of Graham's application on the merits, and thereupon denied the application.

3. Proceedings in the United States Court of Appeals for the Ninth Circuit

The day after the District Court's Order in open court denying the Estate of Graham injunctive relief, Petitioner filed its Notice of Appeal in the District Court, and its Emergency Motion for Order Granting Injunction During Pendency of Appeal or Writ of Mandate in the United States Court of Appeals for the Ninth Circuit. On the same day, the Court of Appeals issued its Order temporarily enjoining respondents from performing destructive testing, pending review of Petitioner's Emergency Motion. On January 21, 1986, the Court of Appeals granted Petitioner's

Emergency Motion, thereby enjoining Respondents from conducting destructive testing pending the Appeal.

The Court of Appeals' January 21, 1986 Order permitted the NTSB and Teledyne to proceed with the testing if the Estate of Graham's representative was present as an observer. Counsel for the Estate of Graham then corresponded with counsel for the NTSB and counsel for Teledyne, requesting that the testing proceed as suggested in the court's January 21, 1986 Order. The NTSB and Teledyne did not reply, thereby requiring the Estate of Graham to seek protection of its rights by pursuing its Appeal.

On December 10, 1986, following briefing and oral argument, the Court of Appeals for the Ninth Circuit issued its Opinion, denying the Estate of Graham's Appeal. Despite the Estate of Graham's filing of a Petition for Rehearing on December 12, 1986, and in violation of the Court of Appeals' Order, Respondents commenced destructive testing of the aircraft's components immediately after they heard of the issuance of the December 10, 1986 Opinion. Once apprised of this situation, the NTSB's Office of General Counsel ordered the NTSB to halt the testing on December 15, 1986.

On February 11, 1987, in response to the Petition for Rehearing filed by Petitioner, the Court of Appeals entered an Order modifying its December 10, 1986, Opinion and denying the petition for rehearing and rehearing en banc. On February 18, 1987, Petitioner filed with the Court of Appeals for the Ninth Circuit an Emergency Motion for Stay of Mandate and Stay of Enforcement of Judgment pending a petition for writ of certiorari before this Court. On February 25, 1987, the Court of Appeals denied Petitioner's Emergency Motion for Stay of Mandate. On March 4, 1987, Petitioner filed with the Court of Appeals for the Ninth Circuit a Motion for Reconsideration of Order Re Stay of Enforcement of Judgment.¹

¹ Petitioner's Motion for Reconsideration is, as of April 6, 1987, still pending. Mandate has not been issued. In supplemental pleadings, the NTSB has represented to the Ninth Circuit Court of Appeals that no further teardown or destructive testing of the engines will occur until mandate issues. In the event mandate issues, pending consideration by

4. Proceedings in the Supreme Court of the United States

On February 14, 1987, Petitioner presented to the Honorable Sandra D. O'Connor, Associate Justice of the United States Supreme Court, its Motion for Stay of Enforcement of Judgment and for Writ of Injunction pending Petition for Writ of Certiorari in United States Supreme Court. On February 27, 1987, the Honorable Sandra D. O'Connor denied this motion.

On February 27, 1987, pursuant to United States Supreme Court Rule 43.5, Petitioner renewed its Motion for Stay of Enforcement of Judgment and for Writ of Injunction, to the Honorable William H. Rehnquist, Chief Justice of the United States. On March 9, 1987, the United States Supreme Court entered its Order Denying the Application for Recall and Stay of Mandate and Injunction addressed to the Chief Justice, and noting that Justice Brennan and Justice Stevens would grant the Application.

BASIS OF FEDERAL JURISDICTION IN THE DISTRICT COURT

Petitioner filed its Complaint for Injunctive Relief in the United States District Court for the Northern District of California on January 8, 1986, pursuant to 28 U.S.C. §§ 1331, 1332, 1346(a)(2), 2201, and 2202.

REASONS FOR GRANTING THE WRIT

The Opinion of the Court of Appeals for the Ninth Circuit stands as the first opinion of a United States Court of Appeals addressing: (1) the limitations on the NTSB's exercise of discretion in conducting its investigation of aircrashes and its handling/preservation of physical evidence, and (2) the conflict between the NTSB's exercise of its discretion and the Constitu-

this Court of Petitioner's request for writ of certiorari, the NTSB will promptly proceed to complete the engine teardown and tests. While this result would deprive Petitioner of certain relief requested, the issues presented for review remain. Petitioner's constitutional rights will not be mooted by completion of the engine teardown. Further, an issue for review relates to the adequacy of damages and remedies available to Petitioner as a result of the conduct of the NTSB and Teledyne.

tional rights of civil litigants. Petitioner respectfully contends that the Court of Appeals' decision on these issues was in error, and that the Court of Appeals further failed to address the issues raised before it regarding: (1) the rights of aircraft owners created by the legislation which established the NTSB as an independent agency, and (2) the validity of the NTSB's regulations in the first instance, as improperly promulgated.

In view of the NTSB's primary role in the investigation of aircraft crashes throughout the United States, and the fact that the Federal Aviation Administration relies on the NTSB's recommendations in promulgating rules governing all aspects of aviation transportation, resolution of the issues decided and left undecided by the Court of Appeals profoundly impacts the safety of interstate commerce by air and the public's confidence in that safety.

The present rules under which the NTSB operates have created inequities that undermine the safety of interstate air commerce and the public's confidence in that safety. The NTSB's practice of designating manufacturers, to the exclusion of others with equally compelling interests in the determination of cause, as parties to the NTSB's investigation of aircraft accidents has created a situation that is arbitrary and capricious, and results in ever increasing challenges by those whose constitutional rights are disregarded.

Aside from Petitioner's claim in this proceeding, the NTSB is acutely aware of recent challenges to its conduct in excluding access to aircraft accident investigations. In *Aerospace Management Services International v. National Transportation Safety Board*, No. 85-1080 (D.C. Cir. Feb. 13, 1985) and *Aerospace Management Services International v. National Transportation Safety Board*, No. 85-1428 (D.C. Cir. July 25, 1985), a challenge was made of NTSB orders which precluded the participation of AMSI from acting as a representative in accident investigations for one of its clients, Piper Aircraft Division of Lear Siegler, Inc. At issue was the language contained in 49 C.F.R. § 831.9(c), which excludes from participation in accident investigations any person who also represents claimants or insurers. AMSI's appeal became moot, due to a subsequent order of the NTSB not subject to a petition of review.

Of current vitality, is the action pending in the Court of Appeals for the Ninth Circuit, entitled *Ronald S. Miller v. Jeff Rich and the National Transportation Safety Board*, No. 87-5650 (9th Cir. March 10, 1987). In *Miller*, the appellant is the aircraft owner whose requests to participate in the accident investigation process have been denied by the NTSB. The appellant therein is apparently asserting that the decision in *Graham v. Teledyne* did not settle the issue of Mr. Miller's rights, as an owner of an aircraft, to participate in the NTSB's inspection of his aircraft which had been involved in an accident.

It is apparent that the *Graham v. Teledyne* decision will not put to rest further litigation of the issues presented for review in this Petition. By granting Petitioner's writ, this Court can begin a process of settling these issues, and also accommodating the interests of parties with a demonstrated legitimate interest in the investigation of aircraft accidents in a manner which merits the confidence of the public. For these reasons, the issues presented in this petition are of national importance, which require resolution by the United States Supreme Court.

I

IF THE REGULATIONS GOVERNING THE NTSB'S FIELD INVESTIGATION PERMIT THE NTSB AND TELEDYNE TO SECRETLY DESTROY PHYSICAL EVIDENCE OF AN AIRCRAFT CRASH INVOLVING THE ESTATE OF GRAHAM, THE REGULATIONS ABROGATE PETITIONER'S CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS

A. The Estate of Graham's Right Under California Law to Have Its Tort Liability Reduced by Indemnification or Contribution from Entities Responsible for the Failure of the Aircraft's Engine(s) in Flight, Is a Valuable Property Right Protected by the United States Constitution

Each of the injury actions which have been filed as a consequence of the aircraft crash at Sun Valley Mall seeks monetary damages from the Estate of Graham, based on allegations that the estate's decedent was, in his capacity as pilot or owner of the

aircraft, responsible for the crash. The Estate of Graham will certainly be called upon to defend itself in these and numerous other actions seeking monetary damages for wrongful death, personal injuries and property damage. These claims against the Estate of Graham will probably amount to tens of millions of dollars.

California law grants to the Estate of Graham a valuable right in its defense against these claims for monetary damages. The Estate of Graham is entitled to have its tort liability (if any) arising out of the aircraft crash reduced by indemnification or contribution from the entity or entities responsible for the failure of the aircraft's engine(s) in flight. *American Motorcycle Association v. Superior Court*, 20 Cal.3d 578, 146 Cal.Rptr. 182, 578 P.2d 899 (1978):

[W]e hold that under the common law of this state a concurrent tortfeasor may seek partial indemnity from another concurrent tortfeasor on a comparative fault basis. 20 Cal.3d at 604, 146 Cal.Rptr. at 199.

In *Singer v. Superior Court*, 179 Cal.App.3d 875, 225 Cal.Rptr. 159 (1986), the California Court of Appeals held that a tortfeasor has a significant property right in a contribution or indemnity action. The Estate of Graham's right to obtain indemnification or contribution in such circumstances is a valuable property right protected by the Fifth Amendment to the United States Constitution. It is well established that claims or causes of action for compensation created by state law are constitutionally protected property rights. *Martinez v. California*, 444 U.S. 277, 281-282, 100 S.Ct. 553, 62 L.Ed.2d 487 (1980), *reh. den.*, 445 U.S. 970, 100 S.Ct. 1285, 63 L.Ed.2d 600 (1980); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-125, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974); *Cities Service Co. v. McGrath*, 342 U.S. 330, 335-336, 72 S.Ct. 334, 96 L.Ed. 359 (1952); *In Re Aircrash in Bali, Indonesia on April 27, 1974*, 684 F.2d 1301, 1312 (9th Cir. 1982).

In *Bali, supra*, the Ninth Circuit Court of Appeals held that wrongful death claims brought by heirs of decedents killed in an aircraft crash were constitutionally protected property rights

under California Code of Civil Procedure Section 477. The ruling made it clear that a cause of action founded on state common law is entitled to no less protection under the Constitution than one founded on state statutory authority:

The [U.S.] Constitution does not create property rights; it merely forbids the extinguishment of those rights. The source of property rights is necessarily common law or statute, usually state statute. This is precisely the type of property to which the fifth amendment is addressed, as the Supreme Court implicitly recognized in *Duke Power [Co. v. Carolina Environmental Stores Group]*, 438 U.S. [59] at 94, n. 39, 98 S.Ct. [2635] at 2641, n.39. 684 F.2d at 1312, n. 10.

B. The NTSB's Threatened Conduct Would Deprive the Estate of Graham of Its Constitutionally Protected Property Right

Procedural due process is violated where a protected property right is caused to become worthless or greatly diminished in value. *United States v. One (1) 43 Foot Sailing Vessel*, 405 F.Supp. 879 (S.D. Fla. 1975); *United States v. One 1971 Opel G.T., Engine No. 77228077, California License No. 194 COE*, 360 F.Supp. 638 (C.D. Cal. 1973). If the NTSB were permitted to secretly destroy the physical evidence of the inflight failure of the accident aircraft's engine(s), the Estate of Graham's constitutionally protected property right, to have its tort liability reduced by indemnification or contribution from the entity or entities responsible for the failure of the engine(s), would become worthless or greatly diminished in value.

Deprived of the physical evidence of the *cause* of the engine failure, the Estate of Graham's ability to meet its burden of proving up its property right in court would, as a practical matter, be destroyed. Without such physical evidence, the Estate of Graham could not effectively meet its legal burden of identifying the party or parties responsible for the engine failure. Was the failure proximately caused by the conduct of the designer, the manufacturer, the repairer or someone else? Without such physical evidence, the Estate of Graham would also be impaired in meeting its legal burden to establish the degree of comparative fault of the party or parties legally responsible for the engine

failure. The destruction of evidence of the degree of comparative fault would likewise destroy Petitioner's ability to establish the degree of the taking of Petitioner's protected property right, and thereby deprive Petitioner of its ability to establish a level of just compensation for such taking.

The NTSB's exclusion of the Estate of Graham from observing the destructive testing, while permitting Teledyne to participate, compounds the deprivation of Petitioner's protected property right. Under such circumstances, the Estate of Graham's ability to obtain indemnification from Teledyne for any defect in the design or manufacture of the engines is reduced, while simultaneously Teledyne's ability to defend against such indemnification is increased. Only Teledyne could present expert opinion testimony from a witness who personally observed the original condition of the engines and their component parts after the aircraft accident.

If the NTSB is permitted to destroy physical evidence critical to the defense of the Estate of Graham in civil tort actions, permitting only a party adverse to the Estate of Graham's defense to participate in the destruction, the Estate of Graham will be deprived of a valuable and constitutionally protected property right. Surely the Estate of Graham's right to defend itself against claims involving millions of dollars is as worthy of protection as the right to not have a helicopter seized for payment of a \$6,000 penalty assessed by the Federal Aviation Administration. *See, United States v. Vertol H21C, Registration No. N8540*, 545 F.2d 648 (9th Cir. 1976). Deprivation of Petitioner's rights, without an opportunity to be heard in a meaningful time or manner, or any form of required hearing is a violation of Petitioner's constitutional rights guaranteed by the Fifth Amendment to the United States Constitution. *Board of Trustees of Western Conference of Teamsters Pension Fund v. Thompson Building Materials, Inc.* 749 F.2d 1396 (9th Cir. 1984), *cert. denied* 471 U.S. 1054, 105 S.Ct. 2116, 85 L.Ed.2d 481 (1985).

II

THE COURT OF APPEALS HAS MISINTERPRETED THE LAW CONCERNING THE ESTATE'S CONSTITUTIONAL RIGHTS, SINCE NO OTHER LEGAL REMEDIES EXIST AGAINST THE NTSB AND TELEDYNE FOR THE DESTRUCTION OF PETITIONER'S PROPERTY RIGHTS

A. Petitioner May Have No Remedy For Spoliation of Evidence Against Teledyne

To the extent the Court of Appeals' Opinion (805 F.2d 1386, 1390, n.9 (9th Cir. 1986)) indicates that Petitioner would have a claim against Teledyne based on its spoliation of evidence, the Court of Appeals has not addressed Teledyne's defense that as agent for the NTSB during the destruction of the evidence it is immune from civil liability for such destruction. Teledyne apparently asserts that under 49 U.S.C. § 1441(c), as an agent of the NTSB, it is authorized to test and destroy the aircraft wreckage, if it deems it necessary, with immunity. If Teledyne may successfully assert such a defense, Petitioner would have no remedy against Teledyne for its destruction of Petitioner's property right to a cause of action for indemnification.

B. Petitioner Has No Tucker Act Remedy Against the NTSB

1. The Tucker Act Does Not Apply to the NTSB

As the NTSB has maintained, it is no longer a subdepartment within the Department of Transportation (an executive department), but is a separate and independent agency which answers directly to Congress. Independent Safety Board Act of 1974, 49 U.S.C. § 1901, *et seq.* Unfortunately, an agency which is not an executive department is not subject to jurisdiction in the United States Claims Court. *Bisom v. United States*, 5 Cl.Ct. 454 (1984).

2. Assuming Arguendo That the Tucker Act Were Applicable to the NTSB, the Destruction of Evidence Destroys Petitioner's Ability to Meet Its Burden of Proof Necessary to Prove an Action for Indemnity in the U.S. Claims Court

The Court of Appeals concluded that a right to equitable indemnity and contribution is not impaired by the NTSB's teardown, since other evidence may be available to Petitioner to enable it to carry its burden of proof on the issue. However, the Court of Appeals failed to consider the fact that conduct by the NTSB during the investigation is likely to permanently destroy evidence, without which the burden of proof cannot be carried by Petitioner in a cause of action for indemnity against Teledyne.

Under California law, where the very act of negligence destroys crucial evidence necessary for a complainant to state a cause of action against the defendant, the burden of proof is then shifted to the defendant. In contrast, Petitioner is unaware of any similar shifting of the burden of proof in actions brought in the U.S. Claims Court. Respondents' destruction of the evidence of an engine failure would, therefore, prevent Petitioner from: (1) carrying the burden necessary to recover in an action for indemnity; and (2) carrying the burden of proof concerning the destruction of her property right in a taking action before the U.S. Claims Court.

III

THE COURT OF APPEALS FAILED TO ADDRESS THE VALIDITY OF THE NTSB'S REGULATIONS UNDER WHICH THE NTSB DENIED PETITIONER'S PARTICIPATION IN THE INVESTIGATION PROCESS

The Court of Appeals concluded that "The NTSB did not abuse its discretion by deputizing Teledyne to participate in the investigation but refusing to accord [Petitioner's] representative of the same status." 805 F.2d 1386, 1389 (9th Cir. 1986). However, the Court of Appeals failed to address Petitioner's argument that in order for the NTSB to so affect Petitioner's substantive rights, the regulations relied upon by the NTSB for its discretionary authority must have been properly promulgated.

The NTSB derives its power to promulgate regulations in this area from three sources. The NTSB is authorized to engage temporary services in the investigation of aircraft accidents. 49 U.S.C. § 1441(b). In addition, the Board is empowered to employ experts and consultants and accept voluntary and uncompensated services. 49 U.S.C. § 1903(b)(6). Finally, the NTSB is delegated authority to establish such rules and regulations as may be necessary to carry out its functions. 49 U.S.C. § 1903(b)(10).

Federal agencies, like the NTSB, that are delegated the authority to promulgate regulations, must comply with the procedures established by the Administrative Procedures Act. 5 U.S.C. § 551, 701. When an agency proceeds with substantive rule-making, it must follow the notice and comment procedures set forth in the Administrative Procedures Act. 5 U.S.C. § 553.

Petitioner pointed out to the Court of Appeals that the regulations in issue, 49 CFR §§ 831.9(a) and 831.10(a) (1985), were not enacted pursuant to the notice and comment rule-making procedures as mandated by the Administrative Procedures Act, 5 U.S.C. § 553. Indeed, the NTSB has taken the position that the above-referenced regulations are rules of practice and procedure, and therefore notice of proposed rule-making procedure is not required. 49 Fed. Reg. 161, 32852 (1984). However, the NTSB's unilateral determination that these regulations are merely of practice and procedure is not dispositive. *General Motors Corp. v. Ruckelhaus*, 742 F.2d 1561 (D.C. Cir. 1984). See also, *Aiken v. Obledo*, 442 F.Supp. 628 (E.D. Cal. 1977).

The legal test to be applied in determining whether notice and opportunity for comment should first be provided is whether a proposed regulation of general applicability has a substantial impact on the regulated industry or an important class of the members or the products of that industry. *Brown Express Inc. v. United States*, 607 F.2d 694, 702 (5th Cir. 1979). Even procedural rules that depart from existing practice and have a substantial impact on those regulated are subject to the requirement to provide notice and opportunity for comment. *Credit Union Nat'l Ass'n. v. Nat'l Credit Union Admin. Bd.*, 573 F.Supp. 486 (D.D.C. 1983).

Unquestionably, these regulations as applied by the NTSB to Petitioner have had a substantial impact on Petitioner's substantive rights. Under such circumstances, Petitioner contends that notice and an opportunity for comment first be provided, since the regulation has a substantial impact on her and others similarly situated as alleged owners or operators of aircraft.

The application of the substantial impact test to 49 C.F.R. § 831.9 and 49 C.F.R. 831.10(a) raises a legal issue as to whether notice and an opportunity for comment should have been provided by the NTSB prior to enacting its rules. Petitioner submits that this Court should address the validity of the regulations relied on by the NTSB, for Petitioner's rights are being disregarded under authority of regulations which are void due to the failure of the NTSB to provide notice and opportunity to comment. *Rivera v. Patino*, 524 F.Supp. 136, 147 (N.D. Cal. 1981).

IV

THE COURT OF APPEALS HAS OVERLOOKED PETITIONER'S RIGHT, CONFERRED UNDER FEDERAL LAW, TO PARTICIPATE IN THE NTSB'S TEARDOWN INSPECTION AS AN ALLEGED OWNER OF THE AIRCRAFT

The Court of Appeals' Opinion states, "In this case we consider the claim of the *pilot's* estate . . . [emphasis added]" (805 F.2d 1386, 1387 (9th Cir. 1986)). The Court has apparently overlooked Petitioner's right in her capacity as the *alleged owner* of the aircraft, to participate in the NTSB's inspection.²

² The Court of Appeals' Opinion avoids this issue by stating that the District Court found that Petitioner had not established an ownership interest. 805 F.2d 1386, 1389, n.6 (9th Cir. 1986). However, the proceedings in the District Court were instituted at the *pleading* stage of the various California state actions against the Estate of Graham, where the allegations are that The Estate of Graham's decedent was the pilot and owner of the aircraft at the time of the accident. Further, the record before the Court of Appeals contains a letter executed by the alleged owners, including the Estate of Graham, retaining Mr. Jensen as their representative for the purpose of participating in the inspection of the

The NTSB's enabling legislation grants Petitioner, as the alleged owner of the aircraft, a privileged status. 49 U.S.C. § 1903(b)(2) mandates that:

[a]ny examination or testing [by the NTSB] *shall* be conducted in such a manner so as to preserve . . . any evidence relating to the transportation accidents, consistent with the needs of the investigation *and with the cooperation of [the] owner*. . . [emphasis added].

By use of the word "shall," Congress mandated that the NTSB's accident investigation be performed with the cooperation of the aircraft's *owner*.

The clear statement by Congress is further reflected in critical portions of the NTSB's Investigation Manual. NTSB Order 6200.1A, Investigation Manual-Aircraft Accidents, (April 25, 1980). The manual specifically instructs the NTSB investigator in-charge that:

[t]he categories of parties [to the field investigation] should be interpreted as permitting an owner/operator to participate . . . *If they request participation, they or their qualified representative should be permitted participation.*

We should always deal with the owner/operator. If he is deceased, *talk to the legal representative of his estate.* When talking to the party representatives, the investigator-in-charge should bear in mind his obligation to make a decision as to what type of expertise should be provided. *The decision must be free of prejudice and not appear capricious.* If a nominated consultant is persona non grata because of the views of other parties (manufacturer, FAA, etc.) or disliked by the investigator-in-charge, *good cause does not exist for his exclusion.* However, if an individual or a private investigator has demonstrated in the past an inability to follow Board direction or makes no contribution to the Board's

aircraft's wreckage. See, Supplemental Affidavit of Moris Davidovitz in Support of Appellant's Emergency Motion for Order Granting Injunction During Pendency of Appeal or Writ of Mandamus, at p. 2 and Exhibit J thereto, filed on January 15, 1986.

investigative effort, the investigator-in-charge should seek the designation of someone else [emphasis added].

Despite these provisions in the NTSB's manual, respondents repeatedly asserted to the lower court, in the briefs and in oral argument, that no authority required the NTSB to permit Petitioner, as the alleged owner, to participate.

The NTSB's wilful exclusion of the alleged *owner* from its teardown investigation is precisely the type of noncooperation prohibited by both the instructions of its own operating manual, and the NTSB's enabling legislation, 49 U.S.C. § 1903(b)(2). It is, therefore, an abuse of the discretion conferred by Congress on the NTSB.

The Court's opinion raises a concern that if Petitioner's claim were sustained, the NTSB would be deluged with requests from bodily injury and property damage claimants to participate in the NTSB's investigation. 49 U.S.C. § 1903(b)(2) does not grant any rights to such claimants, only to the alleged owners of aircraft involved in an accident. Recognition of Petitioner's rights under 49 U.S.C. § 1903(b)(2) does not, therefore, raise the spectre of other requests to participate in the NTSB's investigations. Further, the regulations governing the NTSB's accident field investigation and designation of parties thereto place a lid on the claimed Pandora's box. 49 C.F.R. § 831.9(a) provides in pertinent part that:

...*'Parties to the field investigation shall be limited to those persons, government agencies, companies and associations whose employees, functions, activities, or products were involved in the accident or incident . . . [emphasis added].*

Therefore, the limits the regulation places on the range of participants is sufficient to deal with the court's concerns. Certainly, the court's concerns of a deluge of requests to participate does not justify the exclusion of Petitioner, specifically included by regulation in the designated group of participants.

BY DESIGNATING TELEDYNE AND EXCLUDING PETITIONER AS A PARTICIPANT TO THE INVESTIGATION THE NTSB HAS ACTED IN A MANNER THAT IS DISCRIMINATORY AND CONTRARY TO THE ENABLING LEGISLATION AND THE REGULATIONS PROMULGATED THEREUNDER

A. The Discriminatory Conduct Frustrates Congress' Purpose in the Establishment of an Independent Safety Board

The NTSB was originally established by statute in 1966 as a dependent agency of the Department of Transportation, to promote transportation safety by conducting independent accident investigations and formulating safety improvement recommendations. 49 U.S.C. § 1655(d) (1976) (Repealed in 1975 by the Independent Safety Board Act of 1974, 49 U.S.C. § 1901 (1976)). Due to its dependence to the Department of Transportation, which also had purview over other interstate commerce transportation regulators, in 1974 Congress established the NTSB as an independent agency. The Congressional findings set forth at 49 U.S.C. § 1901 (1976) are a determination that no federal agency could properly perform its functions unless it was totally separate and independent from any other agency of the United States.

The Congressional intent in establishing the NTSB as an independent agency, is to provide the NTSB with the mandate to determine the cause or probable causes of aircraft accidents unfettered by ties and interests of other federal agencies. The NTSB's actions and conduct in this case frustrates the Congressional purpose in establishing its independence. By selecting Teledyne and excluding Petitioner as a party to the engine teardown, the NTSB has created a situation where it is discriminating between parties with potentially adverse interest. The participation of manufacturers, and exclusion of others, in the NTSB's investigation process creates a serious problem of credibility and integrity. Engine manufacturers have their own interests to protect and the bias the investigation process is subject to when only manufacturers are present is precisely the compromise

of independence Congress sought to avoid in establishing an independent agency. This discrimination is a loss of the NTSB's independence, and therefore contrary to the Congressional purpose in establishing an independent agency for investigating the causes of aircraft accidents.

B. The Discriminatory Conduct Is Contrary to the NTSB's Regulations

Congress empowered the NTSB with authority to "establish such rules and regulations as may be necessary to the exercise of its functions." 49 U.S.C. § 1903(b)(10). Pursuant to this delegation of authority, the NTSB has enacted various regulations as it relates to its exercise of its functions in the investigation of aircraft accidents.

The investigator-in-charge, as well as other members and employees of the NTSB, are subject to regulations which govern their responsibilities and conduct. 49 C.F.R. § 805.735-3(c) provides in pertinent part:

Members and employees shall avoid any action, whether or not specifically prohibited by the regulations in this part which might result in, or create the appearance of:

- (2) Giving preferential treatment to any person;
- (4) Losing complete independence or complete impartiality;
or
- (6) Affecting adversely the confidence of the public in the integrity of the government.

The NTSB's designation of Teledyne and exclusion of Petitioner as a party to the engine teardown is preferential treatment prohibited by 49 C.F.R. 805.735(c)(2). Further, the NTSB's conduct is a clear compromise of its complete independence or impartiality in violation 49 C.F.R. 805.735-3(c)(4). In addition, the integrity of the Board in its determination of the cause or probable causes of the accident is adversely affected by restricting participation in the investigation to a party interested in exonerating its engines from fault in the causation of the accident, contrary to 49 C.F.R. § 805.735-3(c)(6).

VI

THE NTSB'S REGULATIONS AND INTERNAL PROCEDURES REQUIRE THAT IT CONDUCT ITS INVESTIGATION CONSISTENT WITH PROCEDURAL FAIRNESS TOWARD AN ALLEGED AIRCRAFT OWNER

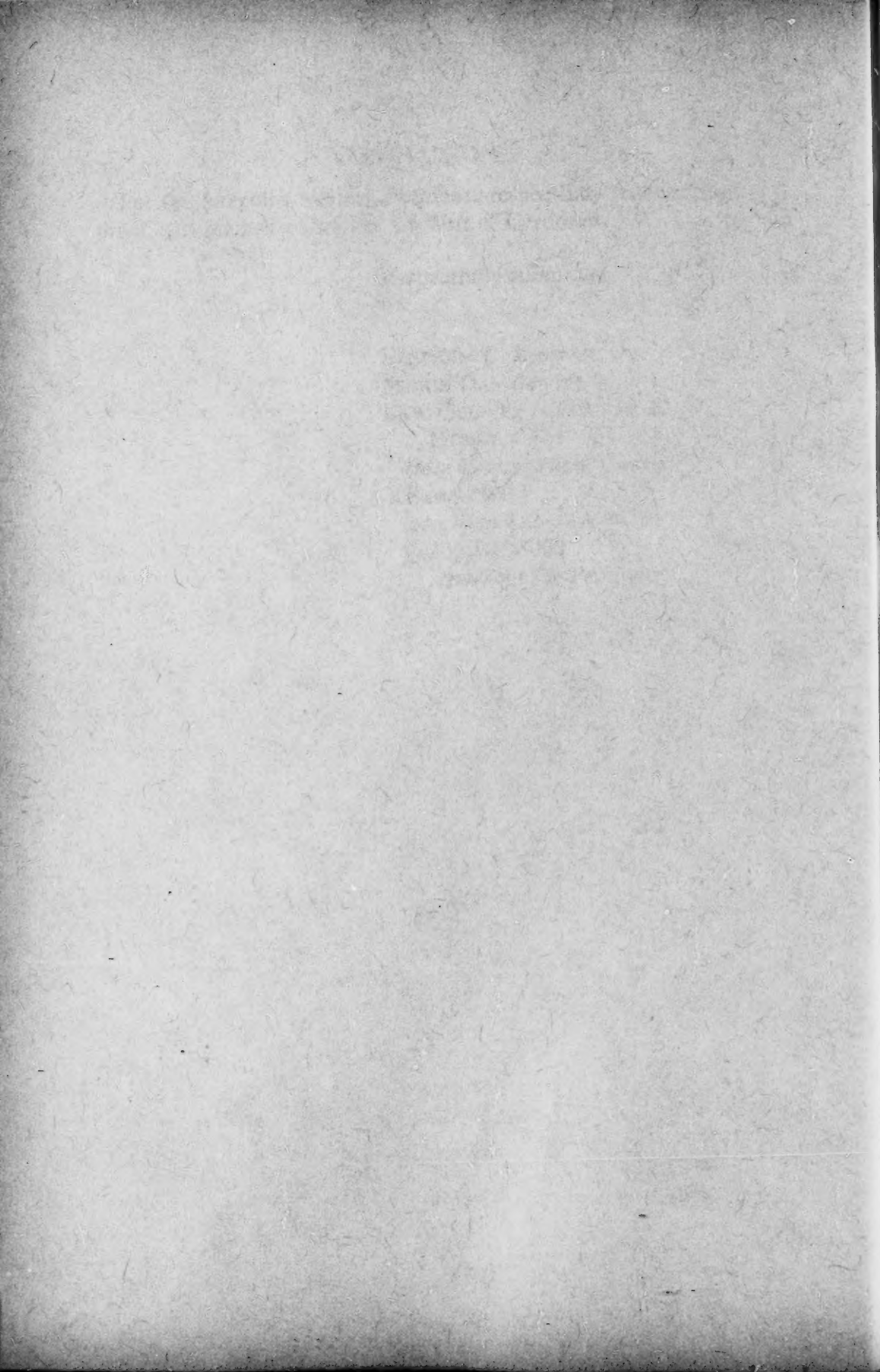
The Court's Opinion erroneously finds that the NTSB's mission to investigate accidents, determine facts, and the probable cause of an aircraft accident, relieves it of any requirement to conduct its investigation within the rules of procedural fairness. 805 F.2d 1386, 1389 (9th Cir. 1986) The Court's Opinion fails to address the effect of 49 U.S.C. § 1903(b)(2), and 49 C.F.R. § 805-735-3(c), and the instructions of the NTSB's own manual, which together make clear that the NTSB's investigation may not be conducted to as to be procedurally unfair to an aircraft owner. Such procedural fairness requires at a minimum that: (1) the NTSB cooperate with the alleged owner; (2) not give preferential treatment to an engine manufacturer; and (3) maintain complete independence and impartiality in permitting access to the inspection process. Having failed to comply with these minimal standards, the NTSB failed to comply with rules of procedural fairness and seriously abused the discretion granted by Congress.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant her Petition for Writ of Certiorari.

Respectfully submitted,

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Appendix

Nos. 86-1530, 86-1668.

United States Court of Appeals, Ninth Circuit.

Dorothy A. Graham, as Executrix of
Estate of James Graham, Deceased,
Plaintiff/Appellant,

v.

Teledyne-Continental Motors, A Division of
Teledyne Industries, Inc., Teledyne Industries, Inc., and
National Transportation Safety Board,
Defendants/Appellees.

Argued and Submitted June 13, 1986.

Decided Dec. 10, 1986.

As Amended on Denial of Rehearing and
Rehearing En Banc Feb. 11, 1987.

On Appeal from the United States District Court For the
Northern District of California.

Before HUG, BEEZER and KOZINSKI, Circuit Judges.

KOZINSKI, Circuit Judge.

When an airplane crashes, the National Transportation Safety Board (NTSB) takes possession of various component parts for purposes of inspection and testing. In this case we consider the claim of the pilot's estate that its representative be allowed to participate in, or at least observe, the NTSB's procedures in order to protect its interests in civil litigation arising from the accident.

Facts

James Graham was the pilot of a twin engine Beechcraft Baron aircraft that crashed into the Sun Valley Mall in Concord, California on December 23, 1985. The accident resulted in five fatalities, numerous injuries and extensive property damage. Appellant Dorothy Graham, the executrix of James Graham's estate,

has been named a defendant in several lawsuits arising from this event.

As charged by the Independent Safety Board Act of 1974, 49 U.S.C. §§ 1901 *et seq.* (1982), the NTSB began an immediate investigation into the cause of the accident. To this end, the NTSB directed that the aircraft's two engines be shipped to their manufacturer, Teledyne Industries, Inc. (Teledyne). There the agency planned to conduct a complete teardown analysis. In accordance with NTSB practice, the proposed inspection and disassembly was to be conducted by Teledyne engineers working in conjunction with, and under the supervision of, NTSB officials.

The practice of disassembling airplane engines and other component parts on the premises of their manufacturer, with the assistance and participation of the manufacturer's personnel, grows out of the NTSB's belief that the manufacturer and its staff are best equipped to perform such functions. Each manufacturer uses somewhat different designs and specifications, requiring somewhat different tools and techniques for disassembly. The NTSB has determined that use of the manufacturer's facilities and personnel will maximize its ability to determine the cause of the accident while minimizing cost.¹

On learning that the NTSB was shipping the engines to Teledyne for inspection and testing, appellant requested permission to have her technical representative participate in, or at least observe, the teardown inspection. Appellant asserted an interest because of the related civil litigation; she expressed fears about possible destructive testing and spoliation of evidence. The NTSB and Teledyne refused appellant's demands. Appellant then brought this action seeking interlocutory and permanent injunctive relief. She alleged that the NTSB examination would cause irreparable harm due to the destruction of evidence, deprive her of due process by impairing her legal rights and remedies, and take her property (consisting of these rights) without just compensation.

¹ Cost is minimized because this practice saves the NTSB from maintaining staff and facilities capable of disassembling every type of airplane component used in civil aviation in the United States.

The district court denied a temporary restraining order, holding that the NTSB did not abuse its discretion under applicable statutes and regulations in deciding who shall participate in the accident investigation. In addition, the district court determined that appellant had failed to establish that any constitutional right would be violated by the pending engine examination.

Graham immediately appealed, challenging the denial of the temporary restraining order. A motions panel of this court enjoined appellees from conducting destructive testing pending resolution of the appeal.

Standard of Review

This is an appeal from the denial of a temporary restraining order. Generally, such an appeal is premature. *Kimball v. Commandant Twelfth Naval District*, 423 F.2d 88, 89 (9th Cir.1970). In this case, however, the denial of the TRO effectively decided the merits of the case: should the NTSB and Teledyne proceed with the disassembly and inspection of the engines, appellant's claims will be rendered moot. Under these circumstances, the court will not require litigants to go through the futile act of reapplying for permanent relief and the denial of a TRO may be treated as a de facto denial of a permanent injunction. *See id.*; *Northern Stevedoring & Handling Corp. v. International Longshoremen's & Warehousemen's Union Local No. 60*, 685 F.2d 344, 347 (9th Cir.1982).

Normally, an appeal from an order granting or denying interlocutory injunctive relief would be reviewed for abuse of discretion, and the inquiry would consider such factors as the balance of hardships and plaintiff's likelihood of success on the merits. *See, e.g., Benda v. Grand Lodge of the Int'l Ass'n of Machinists*, 584 F.2d 308, 315 (9th Cir.1987), *cert. dismissed*, 441 U.S. 937, 99 S.Ct. 2065, 60 L.Ed.2d 667 (1979). However, in this case the only issue we need consider is whether the district court correctly applied the law. There are no facts in dispute, and, as noted, this appeal will effectively resolve the merits: if the district court correctly applied the law, the NTSB will proceed with its testing and the case will be rendered moot; if the district court erred,

plaintiff will be entitled not merely to a TRO, but also to permanent injunctive relief. Despite the posture of the case, therefore, we treat this as an appeal from a final judgment denying permanent injunctive relief. See *Kansas ex rel. Stephan v. Adams*, 608 F.2d 861, 867 n. 5 (10th Cir.1979), *cert. denied*, 445 U.S. 963, 100 S.Ct. 1651, 64 L.Ed.2d 238 (1980); *Jackson County v. Jones*, 571 F.2d 1004, 1007 (8th Cir.1978). The district court's interpretation of the applicable law is subject to de novo review. *International Molders & Allied Workers' Local Union No. 164 v. Nelson*, 799 F.2d 547, 551 (9th Cir.1986).²

Discussion

Appellant bases her claim for relief on two sources of authority. First, she argues that the regulations promulgated by the NTSB pursuant to the Independent Safety Board Act give her a right to participate in the inspection and disassembly procedures, or at least render it an abuse of discretion for the NTSB to refuse her request to participate. Second, she argues that the NTSB's refusal denies her the constitutionally guaranteed right to due process. We consider Graham's regulatory claim first, because doing so might obviate the need to reach the constitutional issue. *Hafans v. Lavine*, 415 U.S. 528, 546-47 & n. 12, 94 S.Ct. 1372, 1384 & n. 12, 39 L.Ed.2d 577 (1974).

² The NTSB argues that its decision to exclude appellant from the examination is one "committed to agency discretion by law" and is therefore immune from judicial review under 5 U.S.C. § 701(a). The agency has not established by the necessary "clear and convincing evidence" that the legislature intended to restrict access to judicial review in this area. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971). Specifically, the NTSB must show that the statute in question provides "no meaningful standard" against which to judge the agency's action. *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985). The code sections authorizing the NTSB's investigation contain a variety of limitations on the agency's power. See, e.g., 49 U.S.C. § 1441(a), (c) (1982). Nothing in the statutory language suggests that Congress intended to foreclose judicial consideration of claims that the agency exceeded those limits.

1. *The Regulations*

Appellant bases her claim on 49 C.F.R. §§ 831.9(a) & 831.10(a), which govern who will participate in the investigation and who may have access to the aircraft wreckage. However, neither of these sections gives appellant the rights she seeks. Section 831.9(a)³ provides that NTSB's "investigator-in-charge *may* . . . designate parties to participate in the field investigation." The section is written in the permissive. It gives no one a right to participate; it merely authorizes the investigator to designate parties to the investigation. Section 831.10(a)⁴ is even less helpful to appellant. That section restricts access to the wreckage to "the Board's accident investigation personnel and persons authorized . . . to participate in any particular investigation, examination or testing." Since appellant's representative is not so authorized, he simply does not qualify under this regulation.

Appellant argues, however, that the NTSB's refusal to designate her representative as a participant in the investigation constitutes an abuse of discretion. In appellant's view, the NTSB was not entitled to exclude an entity with "legitimate interests" in the

³ The regulation states, in part:

The investigator-in-charge may . . . designate parties to participate in the field investigation. Parties to the field investigation shall be limited to those persons, government agencies, companies, and associations whose employees, functions, activities, or products were involved in the accident or incident and who can provide suitable qualified technical personnel to actively assist in the field investigation.

49 C.F.R. § 831.9(a) (1985).

⁴ The regulation provides:

Only the Board's accident investigation personnel and persons authorized by the investigator-in-charge, the Director, Bureau of Accident Investigation, or the Director, Bureau of Field Operations to participate in any particular investigation, examination or testing shall be permitted access to aircraft wreckage, records, mail, or cargo which is in the Board's custody.

49 C.F.R. § 831.10(a) (1985).

outcome of the investigation, while at the same time permitting Teledyne, a party with similar interests, to participate.⁵

Appellant's attempt to impose upon the NTSB investigation rules of procedural fairness reflects a misconception of the Board's mission. The NTSB's authorizing statute provides that the Board shall "investigate or cause to be investigated (in such detail as it shall prescribe), and determine the facts, conditions, and circumstances and the cause or probable cause or causes of any . . . aircraft accident." 49 U.S.C. § 1903(a)(1) (1982). These investigations are not primarily for the purpose of determining civil liability; indeed, the Board has no authority to adjudicate the rights of private parties. The NTSB's function is "to promote transportation safety by conducting independent accident investigations and by formulating safety improvement recommendations." 49 U.S.C. § 1901(1) (1982).

We conclude that the NTSB did not abuse its discretion by deputizing Teledyne to participate in the investigation but refusing to accord Graham's representative the same status. Wherever the parties may stand with respect to each other under applicable tort law, they stand on much different footing vis-a-vis the NTSB's investigation. The use of Teledyne's facilities and expertise in disassembling its own engines could be indispensable in enabling the NTSB to carry out its mission. See 49 C.F.R. § 831.9(a) (1985). By contrast, there is nothing unique appellant's expert could add to the investigation, or so the NTSB could rationally decide.⁶ The only one connected with appellant who might have had unique insight into what happened was James Graham, the pilot, who is dead. The NTSB did not abuse its

⁵ Appellant argues quite plausibly that her interests are antithetical to those of Teledyne. The plane crash was most likely caused either by mechanical failure or pilot error. Establishing one would tend to exclude the other. Graham believes that, by having its technical representatives present when the engines are torn down, Teledyne is given a substantial advantage in any subsequent adjudication of liability.

⁶ In addition to being the pilot's representative, Graham also claims status as the "alleged owner" of the aircraft. The district court found, however, that she had not established an ownership interest.

discretion by determining that it did not require appellant's representative as a participant or observer in the teardown of the engines.⁷

2. The Constitution

Appellant next argues that denying her access to the teardown inspection violates her right to due process. She contends that her right to contribution or indemnity from others involved in the accident is a property right that will be impaired if appellees are allowed to conduct destructive testing. Although appellant's interest in the investigation may be substantial, we conclude that her exclusion does not rise to the level of a due process violation.

Assuming appellant has a property interest in her contribution/indemnity cause of action,⁸ she will suffer no deprivation of that right. At most, appellant may be deprived of certain evidence that could assist her in litigation. Courts have consistently rejected arguments that deprivation of evidence constitutes a denial of due process. See, e.g., *Rosen v. NLRB*, 735 F.2d 564, 577 (D.C.Cir.1984) (no due process right to offer evidence barred by attorney-client privilege); *Samuelson v. Susen*, 576 F.2d 546, 553 (3d Cir.1978) (medical review committee privilege denying

⁷ The district court determined, as an alternate ground for denying access to appellant, that Graham's representative also represented an insurance company. Under the regulations, this would render him entirely ineligible to participate in the investigation. See 49 C.F.R. § 831.9(c) (1985). Appellant contends this finding was clearly erroneous. Given our ruling, we need not reach this issue.

⁸ There is some doubt on this score. Compare *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n. 32, 98 S.Ct. 2620, 2638 n. 32, 57 L.Ed.2d 595 (1978) (no property interest in any rule of common law) and *Ducharme v. Merrill-National Laboratories*, 574 F.2d 1307, 1309 (5th Cir.), cert. denied, 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 677 (1978) (no vested right in tort claim abrogated by Swine Flu Act), with *In re Aircrash in Bali, Indonesia*, 684 F.2d 1301, 1312 (9th Cir. 1982) (wrongful death claim is property within meaning of fifth amendment's takings clause); *Singer Co. v. Superior Court*, 179 Cal.App.3d 875, —, 225 Cal.Rptr. 159, 168 (1986) (tortfeasor has property right in contributions/indemnity action).

plaintiff information central to defamation action does not violate due process); *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 603 F.Supp. 377, 382-83 (E.D.Pa.) (shield law does not violate due process), *aff'd*, 780 F.2d 340 (3d Cir.1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 2927, 91 L.Ed.2d 554 (1986).

In addition, it is highly speculative whether appellant will in fact be deprived of any evidence. While having her representative present at the teardown is one way to ascertain what went wrong, other avenues are open to appellant to obtain substantially similar proof. Appellant will have access to the NTSB factual reports from the investigation. 49 C.F.R. § 845.50 (1985). Moreover, although the expert testimony of Board employees is inadmissible, Graham may secure the testimony of NTSB investigators concerning the factual information they gathered during the course of the accident investigation. *Id.* § 835.3(a), (b). Finally, she will presumably have access to the physical evidence itself after the engines have been released by the NTSB.⁹

Graham's remaining claim for a taking of property is premature. If and when she suffers a deprivation, she may bring an inverse condemnation claim under the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491 (1982). Such a suit, brought after the

⁹ Appellant has expressed concern that Teledyne may alter or destroy vital evidence. This case, however, is not much different from those where an adverse party retains possession of key elements of proof, e.g., purloined trade secrets, documents proving fraud, or machinery involved in personal injury accidents. The presumptions and sanctions available to punish those who alter or destroy evidence must be considered sufficient to deter any misconduct and Teledyne is no doubt aware that its handling of the materials may come under intense scrutiny. *See, e.g.*, Fed.R.Civ.P. 37; *Alexander v. National Farmers' Org.*, 687 F.2d 1173, 1205-06 (8th Cir.1982), *cert. denied*, 461 U.S. 937, 103 S.Ct. 2108, 77 L.Ed.2d 313 (1983) (inference may be drawn against party destroying documents); *Bowmar Instrument Corp. v. Texas Instruments, Inc.*, 25 Fed.R.Serv.2d 423, 427 (N.D.Ind.1977) (sanctions appropriate where party destroyed evidence it should have known would be relevant in future litigation). In any case, as we understand the NTSB's procedures, the engines will be handled by Teledyne employees only under the supervision of NTSB investigators.

NTSB's investigation is completed, would avoid much of the speculation inherent in appellant's current action. It would also allow the NTSB to proceed with its investigation, unencumbered by concerns extraneous to—and inconsistent with—the important mission entrusted it by Congress.¹⁰

Conclusion

The denial of the temporary restraining order by the trial court is affirmed. We remand with instructions that judgment be entered for defendants.

¹⁰ Appellant is not the only one who can claim a legitimate interest in the NTSB's investigation; presumably the estates of others killed in the Sun Valley Mall crash, as well as those who were injured or suffered property damage, could assert that their rights will be impaired if their representatives are not allowed to observe the teardown. If appellant's claim were sustained on constitutional grounds, it would be difficult to exclude these others. The problem would be infinitely multiplied in a crash involving an airliner where literally hundreds of interested parties may be in the position of having some interest potentially affected by the NTSB's investigation. The NTSB would be rendered entirely ineffective in carrying out its mission if it were required to allow all of these parties access to every critical step of the investigation. The government must be allowed to carry out its responsibilities; if private property is taken in the process, the appropriate remedy is a suit for compensation. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019-20, 104 S.Ct. 2862, 2882, 81 L.Ed.2d 815 (1984); *Dames & Moore v. Regan*, 453 U.S. 654, 688-90, 101 S.Ct. 2972, 2991-92, 69 L.Ed.2d 918 (1981).

United States District Court
Northern District of California

NO. C-86-0051-MHP

Dorothy A. Graham, as the Executor of the Estate of
James M. Graham, deceased,
Plaintiff,

v.

Teledyne-Continental Motors,
a division of Teledyne Industries, Inc., and
National Transportation Safety Board,
Defendants.

ORDER

[Filed Jan. 13, 1986]

Plaintiff filed an application for a temporary restraining order to prevent the National Transportation Safety Board and Teledyne-Continental Motors from conducting a tear down and examination of the aircraft engine involved in an air crash on December 23, 1985 in Concord, California, without Plaintiff's representative present. Both Defendants oppose the application. Hearing was held on January 9, 1986. Having read the pleading and Court file and having heard the arguments of the parties, this Court makes the following findings:

Plaintiff has alleged only that she will suffer a deprivation of due process and a taking without just compensation of any claims she may have arising out of an air crash if the NTSB proceeds with testing without her presence. She failed to establish any constitutional right which will be violated by the planned investigation of the National Transportation Safety Board (NTSB). Plaintiff has not established ownership of the aircraft engine in question and there has been no taking of any claim or deprivation of any claim or defense she may have. Plaintiff has orally argued that the NTSB has violated 49 C.F.R. 831.9(a) by not designating its representative as a party to the investigation. Plaintiff does

not deny, however, that its representative is paid by an insurance company and is its representative. This Court does not believe that a final administrative action has been taken from which judicial review may be sought by the Plaintiff. No harm or damage to Plaintiff has occurred, and this action is not ripe for review. Even if this Court does have jurisdiction to review the agency's action, this Court finds that the NTSB has the discretion pursuant to 49 U.S.C. § 1903(b)(10) and 49 C.F.R. 831.9(a) and (c) to determine who shall be a party to the investigation and, specifically the tear down, and it has not abused its discretion. The application should be denied.

It is therefore ORDERED that Plaintiff's application for a temporary restraining order be denied.

DATED: 1/13/86

United States District Judge

THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

INDEPENDENT SAFETY BOARD ACT OF 1974
304(b)(2), U.S.C. § 1903(b)(2)

§ 1903. General Provisions

(b) Powers of Board

(2) Any employee of the Board, upon presenting appropriate credentials and a written notice of inspection authority, is authorized to enter any property wherein a transportation accident has occurred or wreckage from any such accident is located and do all things therein necessary for a proper investigation, including examination or testing of any vehicle, rolling stock, track, or pipeline component or any part of any such item when such examination or testing is determined to be required for purposes of such investigation. Any examination or testing shall be conducted in such manner so as not to interfere with or obstruct unnecessarily the transportation services provided by the owner or operator of such vehicle, rolling stock, track, or pipeline component, and shall be conducted in such a manner so as to preserve, to the maximum extent feasible, any evidence relating to the transportation accidents, consistent with the needs of the investigation and with the cooperation of such owner or operator. The employee may inspect, at reasonable times, records, files, papers, processes, controls, and facilities relevant to the investigation of such accident. Each inspection, examination, or test shall be commenced and completed with reasonable promptness and the results of such inspection, examination, or test made available.

(As amended Pub.L. 97-74, §§ 3 to 5, Nov. 3, 1981, 95 Stat. 1065; Pub.L. 98-499, § 4(b), Oct. 19, 1984, 98 Stat. 2315.)

49 C.F.R. CHAPTER VIII
NATIONAL TRANSPORTATION SAFETY BOARD

49 C.F.R. § 805.735-3 Policy.

(a) The maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by its Members and employees and special Government employees is essential to assure the proper performance of the Board's business and the maintenance of confidence by citizens in their Government. Therefore, the Board requires that its Members and employees and special Government employees adhere strictly to the highest standard of ethical conduct in all of their social, business, political and other off-the-job activities, relationships, and interests, as well as in their official actions.

(b) All Members and employees and special Government employees shall avoid situations which might result in actual or apparent misconduct or conflicts of interests.

(c) Members and employees shall avoid any action, whether or not specifically prohibited by the regulations in this part which might result in, or create the appearance of:

- (1) Using public office for private gain;
- (2) Giving preferential treatment to any person;
- (3) Impeding Government efficiency or economy;
- (4) Losing complete independence or impartiality;
- (5) Making a Government decision outside official channels;

or

(6) Affecting adversely the confidence of the public in the integrity of the Government.

49 C.F.R. CHAPTER VIII
NATIONAL TRANSPORTATION SAFETY BOARD

49 C.F.R. § 831.9(a) Parties to the field Investigation

(a) The investigator-in-charge may, on behalf of the Director, Bureau of Accident Investigation, or the Director, Bureau of Field Operations, designate parties to participate in the field investigation. Parties to the field investigation shall be limited to those persons, government agencies, companies, and associations whose employees, functions, activities, or products were involved in the accident or incident and who can provide suitable qualified technical personnel to actively assist in the field investigation.

(44 FR 34418, June 14, 1979, as amended at 49 FR 32852, Aug. 17, 1984)

49 C.F.R. CHAPTER VIII
NATIONAL TRANSPORTATION SAFETY BOARD

49 C.F.R. § 831.10(a) Access to and release of aircraft wreckage, records, mail and cargo.

(a) Only the Board's accident investigation personnel and persons authorized by the investigator-in-charge, the Director, Bureau of Accident Investigation, or the Director, Bureau of Field Operations to participate in any particular investigation, examination or testing shall be permitted access to aircraft wreckage, records, mail, or cargo which is in the Board's custody.

(44 FR 34418, June 14, 1979, as amended at 49 FR 32853, Aug. 17, 1984)

